



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 4, 2015

Ms. Lisa A. Brown
Counsel for the San Jacinto College
Thompson & Horton, L.L.P.
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2015-15980

Dear Ms. Brown:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 574041.

The San Jacinto College (the "college"), which you represent, received a request for four categories of information pertaining to the requestor's client and any audit or investigation of the college's nursing department by the Texas Board of Nurses or the United States Department of Education during a specified period of time.¹ You state the college will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹We note the requestor clarified her request. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

²Although you do not raise section 552.111 of the Government Code in your brief, we understand you to raise this exception based on your markings.

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

You state the college is withholding some of the requested information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code. We note the United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.⁴ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”).

Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been or should be made, we will not address the applicability of FERPA to any of the information at issue. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records.⁵

Section 552.103 of the Government Code provides, in relevant part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov’t Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is

⁴A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁵Additionally, because our office is prohibited from determining the applicability of FERPA, we do not address your argument under section 552.101 of the Government Code in conjunction with FERPA.

pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you inform us that, prior to the college’s receipt of the request, the requestor’s client and another student filed complaints with the United States Department of Education Office for Civil Rights (the “OCR”). You also inform us the OCR is currently investigating these complaints. Based on your representations and our review of the information at issue, we conclude you have shown that litigation was reasonably anticipated at the time the college received the present request. Further, you explain the information at issue is related to the anticipated litigation because it directly pertains to the subject matter of the complaints. Thus, we find the college has demonstrated the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the college may withhold the submitted information under section 552.103 of the Government Code.⁶

However, we note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a)

⁶As our ruling is dispositive, we need not consider your remaining argument against disclosure.

ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'N. A. Ybarra', with a stylized flourish at the end.

Nicholas A. Ybarra

Assistant Attorney General
Open Records Division

NAY/cbz

Ref: ID# 574041

Enc. Submitted documents

c: Requestor
(w/o enclosures)